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DIRECTORATE OF INTELLIGENCE

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Chile: How Authoritarian is Pinochet's Constitution?

Summary

President Pinochet and numerous senior officials have repeatedly asserted in recent months that they are committed to restoring "safe" and "protected" democratic rule in Chile, and they have charged that foreign critics at best are misinformed about the systematic process the regime is following toward this end. When confronted with calls for liberalizing Chile's political system, such as by substituting a direct presidential election for the single candidate plebiscite in late 1988, Chilean officials have defended the plebiscite as a legitimate electoral mechanism provided for in the 1980 Constitution, which itself was approved overwhelmingly by popular vote. They have also maintained that in his next term, Pinochet will be constrained by constitutional limitations on his authority--such as having to share power with bicameral national legislature--and that he will have to adhere to a firm timetable leading to a full transition to civilian rule by the end of his next term in 1997.

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In [REDACTED] Pinochet conceived of the 1980 Constitution as imposing significant limitations on his authority and a timetable for a transition to a representative democratic system. To the contrary, the process by which the Constitution was formulated, the way in which the popular vote approving it was manipulated, the nature of its Transitory Provisions, and the basic thrust of the charter's other 120 articles, all reveal that Pinochet would face few meaningful restraints on his power should he be reelected. Moreover, the record is clear that Pinochet's underlying purpose--he will be 73 in November--was to establish a constitutional framework that would severely inhibit the power of future civilian presidents and the influence of traditional political parties and civilian pressure groups, as well as perpetuate military tutelage over the political process. [REDACTED]

Formulation of the Constitution

The leaders of the military coup against Socialist President Salvador Allende in September 1973 announced that they planned eventually to restore civilian rule in Chile. First, however, they proceeded to abolish the Constitution of 1925, ban political parties, burn the national electoral registry, and restructure universities, local and regional governments, and the trade union movement. Then the military junta appointed a committee of well-known conservative jurists to draw up a new constitution. Several members resigned, however, when they realized that Pinochet was determined to control the pace and content of the constitution drafting effort. [REDACTED]

As time passed, Pinochet and other regime figures continued to speak of the need to establish a new institutionality to replace the "vices" of the previous democratic system, but it was only in 1977 that he announced a timetable for a possible return to civilian rule. He promised to begin the transition with the adoption of a new constitutional framework in 1980, followed in 1985 by partial congressional elections and selection of the next

The 1925 Constitution was adopted at the insistence of progressive-minded young military officers, who favored a series of basic social and political reforms and a strengthening of presidential powers over Congress, which had dominated governments of the previous three decades.

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president by the legislature, and, finally, direct presidential and full congressional elections in 1991. Leaving no chance, however, in November 1977 Pinochet sent a detailed memorandum to the chairman of the junta-appointed committee giving precise instructions on some 15 very restrictive basic concepts he wanted in the constitutional draft, according to the press. [REDACTED]

In October 1978, the committee produced the required document, which complied closely with Pinochet's instructions--for example, by including articles that magnified the powers of the executive compared to the pre-1973 period--and incorporated a series of structural reforms and "constitutional acts" adopted by decree since the coup. The committee's draft was made public and also submitted for formal review to the advisory Council of State. This body, under the chairmanship of former President Jorge Alessandri, presented a substantially revised draft to the junta in July 1980, toning down some of the executive's powers as spelled out in the committee's version and calling for a five-year transition period with an appointed congress until 1985, at which point open presidential and congressional elections would be held. [REDACTED]

During the public debate on the proposed new charter, a multiparty opposition group formulated an alternative constitutional draft that called for sharply reducing the executive's powers and shortening the transition period, but these points and those of the Alessandri group were ignored by the regime. As a result, Alessandri resigned from the Council and publicly protested against Pinochet's arbitrariness. A new version that Pinochet personally reworked was promulgated by the junta on August 10, making the transition period even longer--specifying that Pinochet would be eligible for reelection in 1989--and further increasing the powers of the presidency.* At the same time, Pinochet announced that this version would be submitted to a yes or no vote in a plebiscite one month later on September 11. [REDACTED]

Manipulating the Plebiscite

The government left no stone unturned to ensure a favorable outcome in the plebiscite, resorting to extensive intimidation of opposition groups, arbitrary measures to undercut the efforts of

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those advocating a "no" vote, and at least some fraud during the balloting and the tabulation of votes. [REDACTED] reports included:

- convoking the plebiscite with only 30 days notice, and to keep its opponents off balance, refusing to lift its state of emergency, which encompassed a wide range of powers restricting the activities of opposition groups and the free flow of information. According to [REDACTED] several academic studies, the government resorted to direct, often physical, intimidation in much of the countryside and smaller cities.
- mounting an intensive and costly publicity campaign depicting the Constitution as an essential instrument to create a "new institutional system" that would facilitate the evolution of a "new democracy" in Chile. Pinochet even announced at one point that he would not be a candidate for reelection in 1988. At the same time, the government denied access to television to moderate opposition parties, sharply restricted their media advertisements calling for a "no" vote, censored most press coverage of opposition activities, and denied permission for all but one opposition rally.
- announcing that all blank ballots would be counted as "yes" votes, to undercut efforts by the well-organized, illegal Communist Party to persuade moderate opposition groups to unite with it in urging massive voter rejection of the plebiscite.
- decreeing, in the absence of an electoral registry, that voting was obligatory for all citizens over 18--some 6.8 million--and establishing procedures for the voting to be controlled entirely by government supporters and, in many instances, public officials. Several opposition parties appointed observers to try to monitor the balloting in major cities, but they were permitted to observe the process only from a distance and did not have the right to comment on irregularities they noted.
- dividing the country into electoral districts, which were subdivided into voting precincts, and publishing a total number of voters, but not names, for each precinct. No provision was made for an electoral tribunal--customary in Chile--to review the voting rules, supervise ballot counting, and act on complaints. The government printed and distributed the ballots, which voters received only upon presenting personal identity cards at voting places. In urban areas the balloting was secret, but in many rural areas peasants were required to fill out their

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ballots in the presence of their employers or public officials, according to press and academic accounts.

Military personnel voted at regimental headquarters.

Tabulating the votes from each precinct was the offices of mayors, and tabulating the national totals in the Ministry of Interior--in both cases with no independent observers present--according to press accounts. The government announced that 67 percent had voted in favor and 30 percent opposed, with the remainder abstaining. It has never made public a final tally, with a breakdown of vote totals by individual polling places. Opposition spokesmen pointed out that this was because in a significant number of cases voting precincts recorded a higher number of votes than the government's total of eligible voters for each locality. The obvious reason, according to the spokesmen, is that release of these data would have quickly revealed how much falsification of balloting took place. The spokesmen also questioned the government's claim of a miniscule abstention rate, noting that traditionally in Chile election abstention rates averaged 15-20 percent.

Ever since the plebiscite, the regime has insisted that it was conducted in an entirely honest way, reacting vociferously to domestic and foreign questioning of its legitimacy, and touting the ostensible 67 percent vote for the Constitution as a reflection of the overwhelming popular approval of the Pinochet government and its efforts to restructure the Chilean political system on a permanent basis. For their part, opposition spokesmen have persistently denounced the plebiscite as fraudulent and unrepresentative. Such criticism until recently received little press play in Chile because of censorship and often brought government reprisals--for instance, the head of the Christian Democratic Party was exiled shortly after the plebiscite when he told the foreign press that it was fraudulent. Nevertheless, as the moderate opposition's campaign for the "no" vote in the 1988 plebiscite has gathered support, its spokesmen have repeatedly scored publicity points with press interviews detailing the government's fraudulent and intimidation tactics during the 1980 plebiscite. The effect, in our view, has been to undercut the assurances frequently offered by the government that its conduct in the 1988 plebiscite will be above reproach.

Import of the Transitory Provisions

The 29 Transitory Provisions that Pinochet insisted on adding to the body of the Constitution prior to calling the 1980 plebiscite were designed to preserve his full control over the

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government and the political process, according to [REDACTED] studies. In essence, they [REDACTED] of government [REDACTED] similar to that in effect prior to the plebiscite and [REDACTED] until at least March 1989 [REDACTED] and under certain circumstances until March 1990--many of the 120 permanent articles of the Constitution containing limits on presidential authority. A notable feature of several of the Provisions is the convoluted and confusing way in which they are written, which government opponents claim was deliberate on Pinochet's part because he wanted to keep as many Chileans as possible in the dark about his real intentions. [REDACTED]

Transitory Provisions 1-14 and 21-24 spell out which of the basic articles of the Constitution are suspended, excluding a wide range of measures affecting individual rights, political activities, and electoral processes. [REDACTED]

Provisions 14-23 lay out the powers of the President and of the Junta once the Constitution entered into effect in March 1981. They specify that Pinochet not only remains as President until March 1989 but that he is eligible for reelection for a new term ending in March 1997. Provision 14 states that Pinochet, who continues as commander-in-chief of the Army, shall no longer form part of the Junta, but that he will appoint--and can remove at any time--the next ranking Army General to serve as his personal representative opposite the commanders-in-chief of the Navy, Air Force, and Carabineros. [REDACTED]

Several of these Provisions describe the division of powers between the President and the Junta in such a way as to make it appear that they are nearly coequal, but a close reading reveals that in all but a few areas ultimate authority rests with the former. For instance, Provision 18 states that the Junta exercises the legislative power, but Provision 19 limits this responsibility to those matters that the Constitution does not assign exclusively to the President--which includes most subjects. Moreover, all decisions adopted by the Junta must be unanimous, which gives Pinochet veto power through his personal representative on that body. Similarly, Provisions 18, 19 and 21 say that the Junta exercises constituent power exclusively and can issue laws to interpret the Constitution and also amend it. Nevertheless, this authority is impaired by the unanimity requirement and by the fact that proposals to amend the Constitution must be approved by plebiscite, which only the President can convoke. [REDACTED]

Provisions 14-23 grant a measure of real authority to the Junta in two important areas. One is the unanimity requirement, which means that even legislative proposals from the executive require the formal endorsement of all members of the Junta.

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non-Army Junta members have used this authority to amend or submit by Pinochet.

A second area in which Pinochet's power is limited is that, pursuant to Provisions 14 and 18, he is not entitled to remove the non-Army members of the Junta. Even in cases where they are to be replaced--because of death, resignation, or incapacitation--the rules of succession in each of the three services govern his selection of another officer, whose appointment must then be approved unanimously by the other Junta members. In the past three years, Pinochet has twice changed the Army representative on the Junta.

Many Chile watchers single out Provision 24 as containing some of the most sweeping powers assumed by Pinochet under the Constitution. It provides that he has sole authority to declare, in response to unspecified acts of violence, that a threat to internal order exists and, as a consequence, to implement a wide range of measures curtailing individual rights and normal political activities. These measures may include orders for extended arrests of persons suspected of terrorist acts, censoring or closing publications, restricting the right of assembly, prohibiting entry of persons into the country or permitting the exiling of anyone deemed harmful to internal peace, and suspending rights of judicial review for any of these actions.

From 1981-1985 Pinochet made liberal use of Provision 24 to harass regime opponents ranging from the far left to the moderate right. [redacted] but we believe that in recent years persistent international criticism of Chile's human rights practices has influenced him to resort much less frequently to this set of extraordinary powers. Nevertheless, he continues to decree states of exception, which keep in place most of the same types of arbitrary powers. For instance, since November 1984, he has twice decreed a state of siege--for which he needed the Junta's approval--and, when that lapsed, he continued in effect

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under his own authority the somewhat less ominous state of emergency and threat of disturbance of internal peace.

Provisions 22, 23, and 9 call for installation of the National Security Council, which until March 1990 would consist of Pinochet, the four members of the Junta, the Presidents of the Supreme Court and the Council of State, and, under one special circumstance, the Comptroller General. This new body, which under the basic articles of the Constitution is designed to institutionalize the direct tutelary role of the armed forces in any future, civilian government, has two major functions during the period embraced by the Transitory Provisions, namely to participate in selecting Pinochet's replacement--if he dies or becomes incapacitated--or in nominating the candidate in the plebiscite to be held later this year. It would participate in either of these choices, however, only if there is a deadlock in the Junta. (Pinochet obviously expects to be the candidate--and to be picked by the Junta)

Provisions 16-17, 20, and 23 lay down the procedures to be followed in the event of Pinochet's death or incapacitation prior to March 1989. Provisions 27-29 describe the process for nominating the candidate for the 1988 plebiscite, convoking congressional elections in late 1989, and what happens if the government's candidate fails to win a majority of the popular vote in the presidential plebiscite.

We believe that the most noteworthy aspects of these regulations--in the context of documenting Pinochet's primacy under the terms of the Transitory Provisions--are the following:

- a) He established a mechanism to ensure that if he dies, the military will retain control over the government and pick from within its ranks his successor.
- b) He plays a direct role in nominating the candidate for the 1988 plebiscite, and there is little doubt that he intends to be that candidate.
- c) Should he lose the plebiscite, Pinochet is entitled to remain in office for an additional year, toward the end of which he is obligated not only to convoke congressional elections but to call for direct presidential elections in accordance with the basic articles of the Constitution.
- d) Nevertheless, most Chilean constitutional experts agree that if Pinochet is defeated in the plebiscite he would be

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ineligible to run in the 1989 open presidential elections. [REDACTED]

Under the Transitory Provisions, Pinochet appears to have several options to continue exerting effective control over the government from behind the scenes even if he loses the plebiscite. Provision 8 states that the commanders-in-chief in office in March 1989 cannot be removed from their positions even by order of a future president for a period of at least four, and probably eight, years. Although [REDACTED] the non-Army Junta members have pressed Pinochet to resign as commander-in-chief of the Army by March 1989, we find nothing in the Constitution that makes him ineligible to continue in that post for the next eight years. As such, he would be a member of the National Security Council and represent the senior, and more powerful, service in dealings with a future elected civilian government. In addition, the Constitution grants him authority to appoint, or indirectly designate, up to nine members of the future 36-member Senate, and also to be a member for life of that body. [REDACTED]

The Permanent Articles

The permanent articles of the 1980 Constitution provide for the establishment of a future political system in Chile that is to be fundamentally different from that of the pre-1973 era. A large part of the 120 articles are intended to perpetuate basic features of the governmental and political processes put in place during the Pinochet regime. [REDACTED]

The Constitution begins by defining in some 23 articles the "new" institutionality and individual rights and duties thereunder. Considerable space is devoted to the doctrine of national security, controlled and interpreted by the armed forces, as the permanent guiding principle of national political life. A key feature is Article 8, which outlaws the propagation of all doctrines advocating violence or class struggle. The government has resorted to this article on several occasions in recent months in ordering the arrest and prosecution of journalists and far left political leaders accused of a variety of offenses, including harboring subversive thoughts. [REDACTED]

Other articles declare all parties or groups supporting subversive doctrines to be unconstitutional, and impose severe restrictions on the right of persons who espouse Marxist and other unacceptable ideas to obtain employment. Typical of the arbitrary nature of most parts of this section is Article 19, which spells out the rights of those individuals who do not act contrary to moral standards, public order and the security of the

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state while imposing sharp restraints on violators of these precepts. It also contains detailed restrictions on political parties, labor unions, and educational institutions and prescribes strict limits on freedom of expression by the media, the theater, and a variety of associations. Other articles emphasize the preeminence of the economic philosophy of Pinochet regime, making clear that the state should play only a limited role in the economy. Special emphasis is placed on the right of private property, in what constitutional experts interpret as an effort to preclude the possibility that a future government might espouse any type of agrarian reform.

The next three chapters of the Constitution (through Article 72) set forth the powers of the presidency and of the congress. The presidency emerges with greatly increased powers even compared to the 1925 Constitution, and it is clearly dominant over the legislature, especially the Chamber of Deputies. For instance, the president can dissolve the Chamber and decree certain types of legislation without congressional approval. Congress' power over the budget is limited--it may not increase state expenditures--and its power to restrict the president's recourse to states of exception is very limited. The president appoints all local and regional officials, as well as a wide number of national officials--a departure from pre-1973 practices when most officials were either elected or appointed pursuant to congressional review.

The Chamber of Deputies' 120 members are to be elected directly for four year terms--but the regime has already enacted legislation rigidly controlling the internal processes by which political parties select candidates and prohibiting elected representatives from being responsive to party directorates. The Senate will have 26 popularly elected members who will serve eight year terms, but at least nine other members are to be appointed directly or, probably, indirectly by the President. The fact that the president presumably will control a third of the Senate's membership is a key ingredient in any effort to amend the Constitution under a future government, inasmuch as approval by three-fifths of the members of each house is required.

The next four chapters (through Article 89) deal with the judicial system and the Office of the Comptroller General, and here again the power and independence of these bodies in relation to the presidency is considerably curtailed in comparison with the pre-1973 period, according to academic studies. For instance, three of the seven justices of the Constitutional Tribunal are selected by the president and the National Security Council, and one is to be elected by an absolute majority of the Senate. Moreover, the courts lack jurisdiction in cases where the president, acting, for example, under the authority Article 8

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affords him, unilaterally suspends guarantees of individual rights. Perhaps the most fundamental potential limitation on the future independence of the court system is that the National Security Council is empowered to object to--and obviously insist on reversal of--any act by any branch of government that it considers to operate against national security.

Two brief chapters (Articles 90-96) describe in general, terms the powers and duties of the Armed Forces and the National Security Council. For instance, the Armed Forces' main role is described as to defend the fatherland and to guarantee national security and the institutional order. Nevertheless, Chilean constitutional experts have emphasized that the fundamental purpose behind these provisions is to safeguard for the military the broadest possible role in guaranteeing the "new" institutional order and in utilizing their authority as final arbiters of what the doctrine of national security embraces to exert direct tutelage over future governments for as long as necessary.

A final chapter (Articles 116-120), dealing with amendments to the Constitution, contains a series of restrictions on congressional authority to initiate amendments and considerable detail on the paramount role of the president. The effect, according to numerous academic studies, is to make the Constitution virtually unamendable in less than 4-5 years and absolutely unchangeable should the National Security Council object.

Outlook

There is, in our view, little in Pinochet's Constitution that imposes limits on his continued domination over the government and the political process for as long as he is President. Moreover, he has crafted a charter that goes a long way toward perpetuating the basic features of the system he implemented during the past 15 years, and the available evidence strongly suggests that the military fully intends to continue exerting strong tutelage well into the 1990s.

We also believe that this has impelled leaders of the moderate opposition to announce repeatedly in recent months that if their "no" campaign succeeds in defeating Pinochet in the plebiscite, they will insist on holding negotiations with the Junta to modify at least some constitutional provisions. At a minimum, they probably expect to obtain the Junta's agreement to hold direct elections earlier than is laid out in the Transitory Provisions and to modify the restrictions on amending the Constitution. Whether they will insist on other basic changes, such as reducing the role of the National Security Council,

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changing the composition of the Senate, and modifying the role of the commanders-in-chief appears less likely at this point. Nevertheless, we believe that they will want to arrive at an understanding with military leaders that precludes a defeated Pinochet from continuing to exert power from behind the scenes as head of the Army, member of the National Security Council, and Senator for life. We recognize that to accomplish this goal they will have to walk a fine line in their dealings with the military to avoid creating the impression that they intend to jettison the basic features of the "new" institutionality provided for in the 1980 Constitution, and in the process demolish the tutelary role that the military almost certainly intends to preserve regardless of a loss in the plebiscite by Pinochet.

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